

# LEGAL MANAGEMENT:

*The Case for a Managed Model for  
the Delivery of Legal Services*

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Abstract: This essay takes a brief look at the innovations in the delivery of legal services made due to the expansion of the pre-paid sector and uses those changes in the power dynamics of the industry to make a compelling case for a more widespread, managed model. The managed model of the future could involve much greater involvement by “management” intermediaries to counter the power of the monopoly held by the Bar, to improve the efficiency with which legal services are delivered to huge portions of the American population, and to improve overall “justice” in American society.

“The role of the judiciary and the legal profession is to manage and operate the mechanisms and procedures of justice in service to their *clients* and *society*.”<sup>1</sup> Most of the focus, however, has been at the micro level (“*clients*”), where we ask the question whether justice has been served for an individual client who has gone through the legal process. To ensure “quality” representation, fair treatment, and procedural efficiency in each individual case, the legal profession is internally governed by a variety of rules, including the Model Rules themselves. While lifting the quality of service, these rules also serve to raise the cost of legal advice and protect the profession’s monopoly on legal consulting.

Until fairly recently, a majority of the U.S. legal profession has mostly forgotten (or ignored) justice at a macro level—“*society*” as a whole—in favor of micro-level justice. In other words, the profession has favored high-quality, individualized delivery of legal services over increased, widespread access to legal advice. As a result, academic studies have consistently determined that low- and moderate-income people have a tremendous need for legal assistance which is not being met.<sup>2</sup> To clarify, this is not just a problem of poverty: beginning with the 1992 ABA Comprehensive Legal Need Survey, numerous studies have confirmed that America’s middle class “[has] difficulty affording

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<sup>1</sup> Robert E. Hirshon, President of the American Bar Association, during his Keynote Address delivered at the National Conference on Unbundling in Baltimore, Maryland, on October 12, 2000. (Emphasis added.)

<sup>2</sup> Robert E. Hirshon, The Importance of Unbundling Legal Services, 40 FAM. CT. REV. 13 (January 2002) 13.

legal services as currently provided, [fails] to understand when a lawyer may be helpful to their problem, [is] reluctant to talk to an attorney, and [does] not use attorney services for the majority of [its] legal problems.”<sup>3</sup> These are not people who have no money to spend; they are people who cannot afford to spend as much as the profession presently demands.

Those members of the profession who have fought for macro-level justice, including Legal Service Corporation attorneys and supporters, have tended to fall into a micro world of their own: the provision of legal services to the very poor and destitute. This is an entirely rational result: given the extraordinarily low funding of such programs, one must target those most in need.

This paper, therefore, begins with a fairly unique premise: interests within the legal profession are so fragmented that few have really stopped to consider whether a different, systemic, managed delivery model could efficiently improve the level of justice at micro *and* macro levels. The *fear of business management of the legal profession* has led the ABA to reject such a notion; I, on the other hand, will argue that such a system promises a brighter (and inevitable) future.

Broadly, this paper is divided into four parts. Part I will describe, from the perspective of a business system, the evolution of the power dynamics of the current delivery system (often referred to as the “traditional model”). Part II will attempt to explain the current supply chain operation and identify its failures. Part III will build upon the pre-paid legal services model to advocate a new managed delivery system for legal services—a solution-based model. Part IV will then consider some of the criticisms of significant change to the current legal access model and explore the tradeoffs involved.

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<sup>3</sup> Hirshon (January 2002), *supra* note 2, at 14.

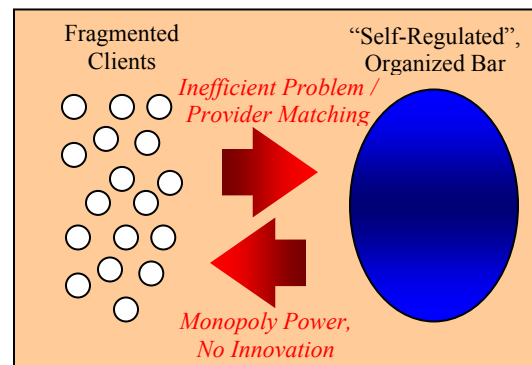
## PART I: THE “TRADITIONAL MODEL”

I wish to tell a unique history of the innovations made through the spread of pre-paid legal services: rather than focusing on changes in the *legal rules and foundations* over time, it is useful to tell the story from a *business perspective* and analyze the changes in the functioning of the industry.<sup>4</sup> As an industry, the advent of pre-paid legal services and the resulting transformation to the delivery of legal services can be divided into three distinct stages:

### ***Stage 1: Monopolized “Professional Service”***

The competitive dynamics that form the foundations of the legal industry are not unique. In fact, they are highly predictable<sup>5</sup> and replicated in almost any industry with strong monopoly power. At the core of the industry is a strong, cohesive group (Bar-certified lawyers) which, through Bar organizations and political influence in Washington, holds a largely unregulated monopoly over the provision of legal services nationwide. The lawyers, who are well organized due to the constraints of entering and practicing within the system, sell very complex services to an extremely fragmented group of individuals who have no real pricing power and an inability to measure relative quality. It is important to note that the

FIGURE A: THE “TRADITIONAL” MODEL



<sup>4</sup> For a more traditional history of the growth of pre-paid legal services, see Stephen F. Herbes, *Prometheus or the Trojan Horse?: A Look at the Prepaid Legal Services Industry in the United States*, DLS and Third-Year Paper, 2001 (on file with the author).

<sup>5</sup> Almost any business model of competitive dynamics gets you to this result, including Michael Porter’s often-cited Five Forces.

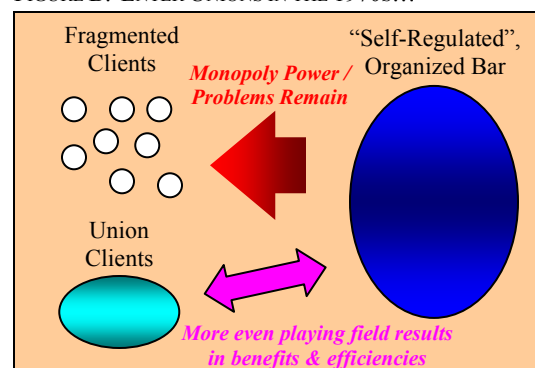
only clients who do have any power in the relationship are the ones Mark Galanter describes in his article: repeat players with some legal savvy and lots of billable hours.<sup>6</sup>

### ***Stage 2: Union Influence***

As a result of being taken advantage of by the marketplace, certain sets of individuals organized into groups (e.g. unions) to increase their power in the system and attempt to bargain for a better deal

(including both price and quality). This transition is perfectly analogous to the unionization of the Big Three auto manufacturers in the mid-twentieth century: until the UAW's GM strike in Flint in 1937, the manufacturers were organized, the

FIGURE B: ENTER UNIONS IN THE 1970S...



workers were entirely fragmented, and the “company towns” were run for the benefit of the companies—the concept of workers as stakeholders was entirely foreign. In the context of delivery of legal services, the outcome of the union movement for legal plans segregated the population (just like in Detroit): the union members received the benefit of collective bargaining and the others didn't. (Figure B) In other words, the individuals most in need remain the least powerful—and end up getting squeezed even more.

### ***Stage 3: Pre-Paid Legal Plans***

The advent and spread of pre-paid legal service plans changed that dynamic to level the playing field more broadly. By placing the plan provider as an intermediary between the fragmented customers and the legal service providers, we end up with a

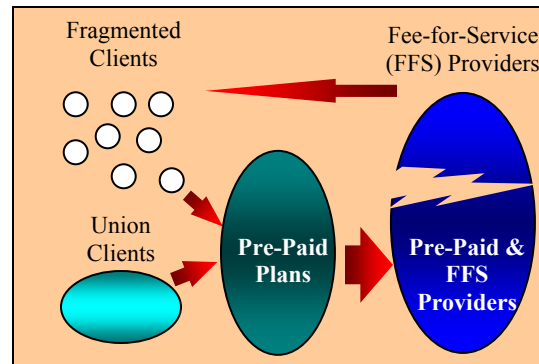
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<sup>6</sup> Mark Galanter, *Why the Haves Come Out Ahead*, LAW & SOCIETY REVIEW Vol 9 No 1 (Fall 1974) pp. 95-160.

power dynamic which looks a lot more like Figure C. All of a sudden, there is a client advocate who is powerful enough to have a real impact on the delivery of legal services.

That impact can have effects on pricing, service, quality, cost effectiveness, and a variety of other important variables. It's always been assumed that the Bar is "self-regulated" because it does so well. The appearance of an intermediary like pre-paid plans now brings that into doubt—it looks

FIGURE C: PRE-PAID PLANS AS AN INTERMEDIARY



more likely that the Bar has remained "self-regulated" because it's been extremely good at defending the fort. Two historical facts about the reactions to pre-paid plans should therefore be unsurprising: first, that the Bar managed to use its rule-setting powers to forbid pre-paid legal service plans for many years<sup>7</sup>, and second, that in the time they have been "ethically" permitted, those plans have taken the legal world by storm.

As evidence of the second point, it is currently estimated that 122 million Americans (over 40%) are covered by some sort of legal services plan.<sup>8</sup> Although individually-purchased prepaid plans are only approximately 15% of the total, they represent the fastest growing category (at about a 20% growth rate over the past two years).<sup>9</sup>

Beyond widespread coverage, there's also evidence that pre-paid legal services plans are finally forcing innovation through the Bar. Aside from reforming the supply

<sup>7</sup> See, e.g., Judith L. Maute, *Symposium: Pre-Paid and Group Legal Services: Thirty Years After the Storm*, 70 *FORDHAM L. REV.* 915 (December 2001).

<sup>8</sup> The National Resource Center for Consumers of Legal Services, *2002 Legal Services Plan Census*, News Release June 3, 2002, available at <http://www.nrccls.org/Publications/census2002/2002census.html> (last visited November 23, 2002). [hereinafter NRCCLS website]

<sup>9</sup> NRCCLS website, *supra* note 8.

chain (see Part II below), there is now increasing evidence that the business model is slowly changing for the better.<sup>10</sup> If nothing else, the growth of the sector has triggered a tremendous number of academic and professional reports on the subject.<sup>11</sup> As William A. Bolger, the Executive Director of the National Resource Center, explained in the 2002 report:

Legal services plans help balance the scales of justice by giving the average individual the same ready access to legal advice and information that big business and the wealthy have always enjoyed. Timely advice helps people accomplish their objectives, avoid legal difficulties, and resolve problems without litigation.<sup>12</sup>

## **PART II: THE LEGAL SERVICES SUPPLY CHAIN**

There is little doubt that the pre-paid sector and its accompanying innovations are changing the delivery of legal services. The questions that remain are how and how much. To answer those questions, it's important to understand clearly the current legal services supply chain and its shortfalls. (See Figure D, page 9)

“Rugged individualism has shaped most facets of American culture, including the client-lawyer paradigm.”<sup>13</sup> The supply chain in Figure D shows exactly how that rugged individualism has played out: an individual who faces a legal problem for the first time has little guidance and even less negotiation power. We may have outgrown the rugged individual ideology.

Evidence from long ago supports such a finding: using data from the American Bar Foundation, a Yale Law Journal study statistically demonstrated in 1980 that lawyer use primarily depended upon three variables: how often an individual experienced legal

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<sup>10</sup> Based on phone interviews with various members of the staff at Pre-Paid Legal Services, Inc. in November 2001.

<sup>11</sup> For example, a Lexis search produced 27 law review articles written about pre-paid legal services plans since 1995, almost two-thirds of which were published in the last three years.

<sup>12</sup> NRCCLS website, *supra* note 8.

<sup>13</sup> Maute, *supra* note 7, at 917.

problems, ownership of real property, and personal acquaintance with a lawyer.<sup>14</sup> Level of need did not make the list. The following comments are illustrative of the problems inherent in the fee-for-service supply chain, as shown in Figure D, which places the burden on the client to locate a competent attorney and reach agreement on the work to be done and the fee to be paid:

Until quite recently, prospective clients bore primary responsibility to recognize they had a legal problem, locate a lawyer willing to help, and hire that lawyer on the basis of fees-for-services. Ethical rules prohibiting advertising, solicitation and volunteering advice cast lawyers in a passive and reactive mode. *The model worked reasonably well for some sophisticated consumers of legal services, particularly repeat users*, who had established contacts with the legal community and access to reliable information about lawyers competent in their area of need. *For many occasional users, however, finding a lawyer competent to provide a particular type of legal services at an affordable cost was a matter of pure serendipity.* (Emphasis added)<sup>15</sup>

Clearly, there is room to create value through a new delivery system. At their core, the current pre-paid legal plans ultimately offer:

24-hour access to legal consultants who are capable of providing simple, though often highly important, legal services to the group legal plan member without delivering the anxiety of huge legal bills or the daunting task of choosing a lawyer out of the yellow pages.<sup>16</sup>

In fact, one group legal plan provider has found that as many as 70% of the situations about which plan members call are simple enough to be resolved over the telephone.<sup>17</sup>

The changes on the monitoring end of the system are equally impressive.<sup>18</sup> Perhaps more importantly, however, the pre-paid legal sector also opens up the possibility for significant further reform of the supply chain and the power dynamics currently plaguing the legal sector. The next section offers and develops one real possibility.

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<sup>14</sup> Russell Pearce et al., Project, *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 YALE L. J. 122, 143-45, 153-54 (1980).

<sup>15</sup> Maute, *supra* note 7, at 917.

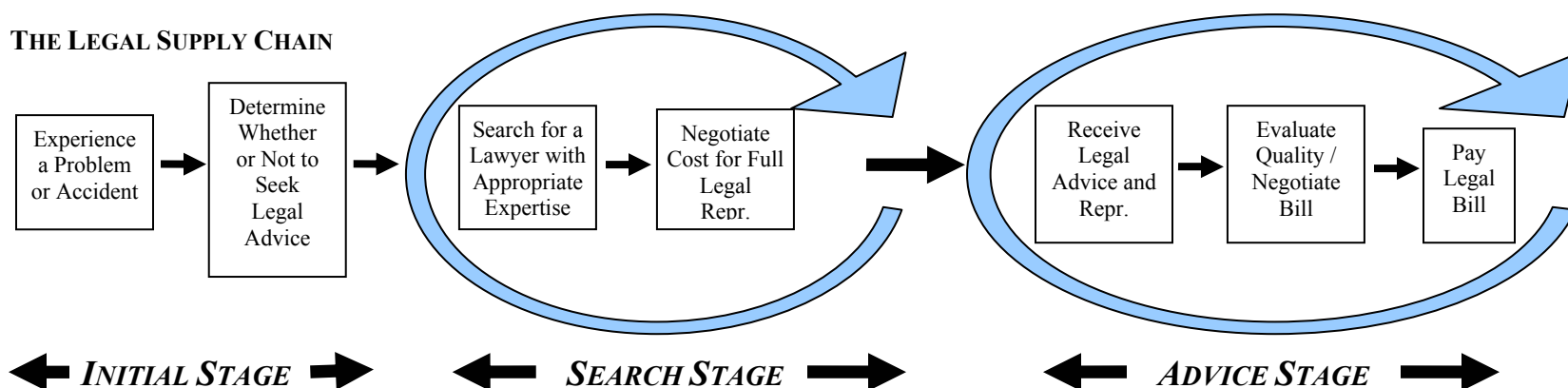
<sup>16</sup> Brian Heid & Eitan Misulovin, *The Group Legal Plan Revolution: Bright Horizon or Dark Future?*, 18 HOFSTRA LAB. & EMP. L. J. 335 (Fall 2000).

<sup>17</sup> Heid & Misulovin, *supra* note 16, at 342.

<sup>18</sup> See, e.g., Heid & Misulovin, *supra* note 16, at 335-345.



**FIGURE D: THE LEGAL SUPPLY CHAIN**



**PROCESS / VALUE CHAIN FOR TRADITIONAL PAY-FOR-TIME/PERFORMANCE LEGAL SERVICES**

	PROBLEM	EVALUATION	SEARCH PROCESS		ADVICE PROCESS		
Brief Description of Step:	<ul style="list-style-type: none"> <li>Legal problem arises without notice.</li> </ul>	<ul style="list-style-type: none"> <li>Individual decides whether to consult lawyer.</li> </ul>	<ul style="list-style-type: none"> <li>Attorney Search begins.</li> </ul>	<ul style="list-style-type: none"> <li>Price negotiation occurs. If unacceptable, back to the search process again.</li> </ul>	<ul style="list-style-type: none"> <li>Receive advice and representation.</li> </ul>	<ul style="list-style-type: none"> <li>Evaluate quality before approving bill.</li> </ul>	<ul style="list-style-type: none"> <li>Pay Bill</li> </ul>
Core Capabilities Required	<ul style="list-style-type: none"> <li>It just happens. Individual needs to recognize the problem.</li> </ul>	<ul style="list-style-type: none"> <li>Needs to recognize how lawyers can and can't help (or have an advisor/friend).</li> </ul>	<ul style="list-style-type: none"> <li>Network of lawyers or friends with experience dealing with similar problem.</li> </ul>	<ul style="list-style-type: none"> <li>Ability to know what the cost of representation should be—and an understanding of the time it will take.</li> </ul>	<ul style="list-style-type: none"> <li>Ability to be a “good client”.</li> <li>Must have a “good” lawyer.</li> </ul>	<ul style="list-style-type: none"> <li>Must have an understanding of what a dollar should buy in a given instance.</li> </ul>	<ul style="list-style-type: none"> <li>Money</li> </ul>
Keys for Success:	<ul style="list-style-type: none"> <li>Don't panic.</li> <li>Must feel confident and address the problem directly.</li> </ul>	<ul style="list-style-type: none"> <li>Previous experience with lawyers or a good advisor with experience.</li> </ul>	<ul style="list-style-type: none"> <li>Previous experience with similar problem.</li> <li>Good referral.</li> <li>Luck.</li> </ul>	<ul style="list-style-type: none"> <li>Competitive information about the market cost of legal services and the time a certain kind of representation should take.</li> </ul>	<ul style="list-style-type: none"> <li>Previous experience</li> <li>Often hands-off process for client—trusts the lawyer.</li> </ul>	<ul style="list-style-type: none"> <li>Previous experience or good advisors (or endless money).</li> </ul>	<ul style="list-style-type: none"> <li>Disposable income, upfront payment, or contingency fees.</li> </ul>
Process Risks:	<ul style="list-style-type: none"> <li>Individuals most at-risk of being taken advantage of are least likely to have the ability to avoid it.</li> <li>Some won't recognize that they are facing a legal problem at all—and will fall out of the system before they even enter.</li> </ul>	<ul style="list-style-type: none"> <li>A majority of individuals have no one to consult—except for contingency lawyers who won't give them impartial advice.</li> <li>Non-savvy individuals may fail to get adequate advice — and problems will get worse with time.</li> </ul>	<ul style="list-style-type: none"> <li>Turn to the yellow pages and end up with a hungry lawyer without the correct expertise.</li> <li>Because of knowledge asymmetry between lawyer and client, client gets talked into inappropriate advice and strategy.</li> </ul>	<ul style="list-style-type: none"> <li>Initial consultations often cost a lot of money—in which case the client has already invested money in the relationship and will be unlikely to search around for better prices.</li> <li>Prices are extremely opaque – even the experienced client won't know how much it will cost.</li> <li>System is not set up for price comparisons.</li> </ul>	<ul style="list-style-type: none"> <li>Taken advantage of by the lawyer—lawyer has no real incentive to limit time spent to “efficient” amounts or settle at “efficient” outcomes.</li> <li>Client may fail to understand what is going on, and lawyer may not be good at explaining.</li> </ul>	<ul style="list-style-type: none"> <li>Possibility that the client does not expect the high cost of representation.</li> <li>Once the client has begun a relationship with a lawyer, he/she is basically stuck and susceptible to being taken advantage of.</li> </ul>	<ul style="list-style-type: none"> <li>Huge collection risk.</li> <li>Substantial costs involved in billing—approximately 15-20% of any bill is payment for the billing process and related overhead.</li> </ul>

### PART III: A NEW SYSTEM

The most exciting aspect of the success of pre-paid legal services involves the possibilities it opens up for reform of the traditional system in the future. A system where the delivery of legal services is managed—rather than serendipitous—may be just around the corner. “Legal Management” involves not simply providing a service for a fee, but rather *providing a solution* to a customer—and doing so cost-effectively. The system must do the following (as shown in Figure E):

1. Catch people as they experience legal problems and help them identify whether legal advice is required;
2. Match those people with an attorney who specializes in that type of legal problem;
3. Monitor the provision of legal services and provide incentives for both quality and cost-efficiency;
4. Reduce costs by eliminating the need for complex billing systems and by taking the risk out of collection (potential savings of more than 20%);<sup>19</sup>
5. Provide added flexibility for lawyers in how they manage their practices; and
6. Build a knowledge base of information which, combined with total market power, allows the customer base (rather than the Bar monopoly) to drive innovation in the legal sector.

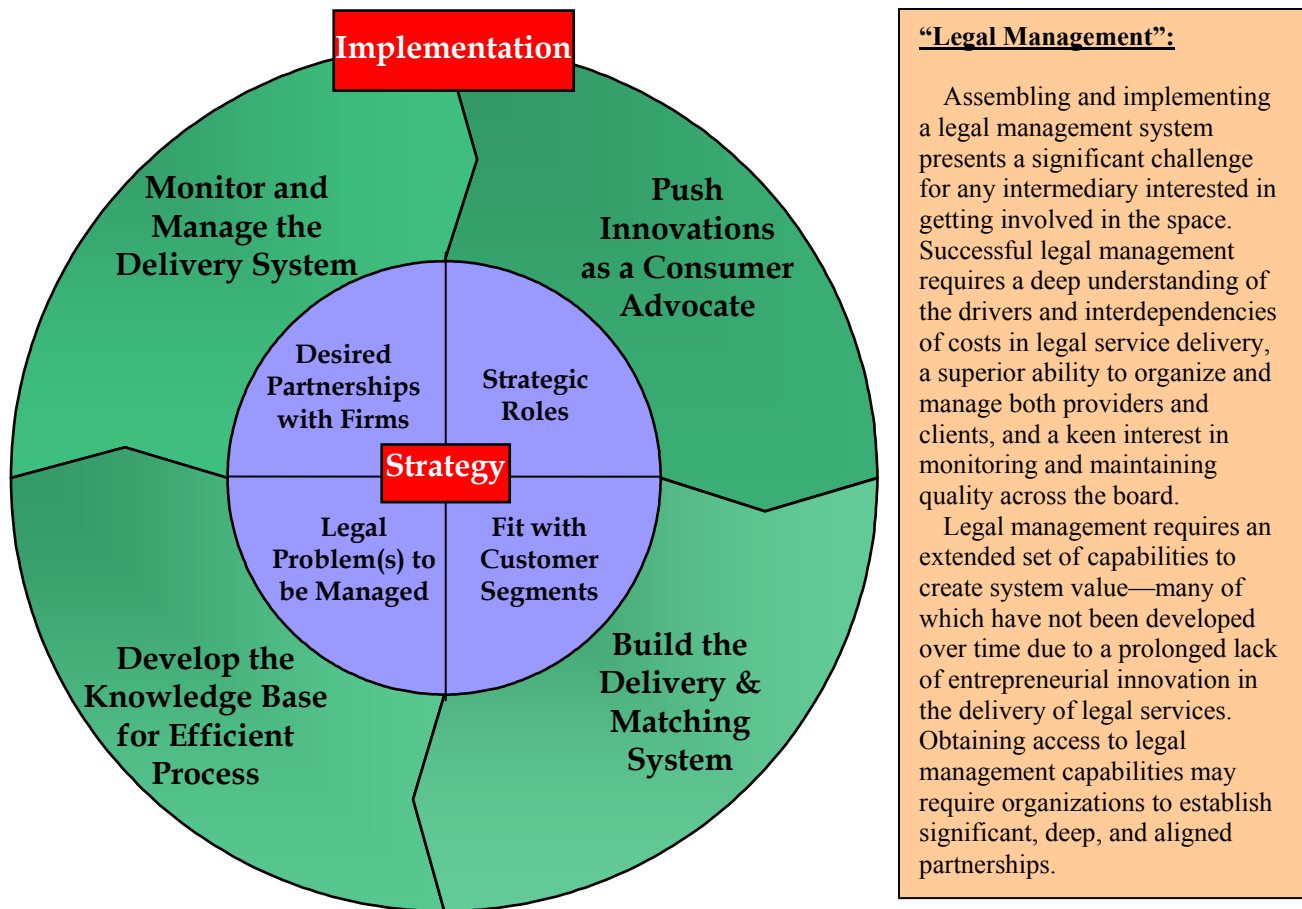
Pre-paid legal services is a big step in that direction, but it is not enough. The graphic below helps to illustrate the full strategic and implementation roles of a legal services manager—an intermediary (like a pre-paid plan provider) who manages the full solution. Aside from the cost savings and value creation, perhaps *the most exciting aspect* of such a system would be its potential ability to cater to the legal needs of the destitute with governmental support at a fraction of the cost of the current system.<sup>20</sup>

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<sup>19</sup> Based on interviews with various professionals, who estimate that at least 20-25% of today’s billed dollars go towards billing infrastructure, collection risk, and non-legal “client service” (not including general overhead). Interviews with representatives at Pre-Paid Legal Services, Inc. revealed estimates as high as a third.

<sup>20</sup> While this paper will not go into great detail on the subject, it is fairly easy to imagine the model presented being scalable to provide subsidized legal access the lower classes.

FIGURE E: BECOMING A LEGAL SERVICES MANAGER <sup>18</sup>



We can equally imagine other innovations to follow: utilizing the collective nature of the intermediary to negotiate better rates with online research providers, allowing more lawyers to work from home and on flex-time, providing relevant continuing education to a network of increasingly-qualified specialists, etc. The idea of a managed solution provides a steady stream of potential innovations and payoffs for all involved—a traditional win-win situation.

<sup>21</sup> Aspects of this model have been borrowed and adapted from a senior management report published by The Boston Consulting Group in 1995 titled, “The Promise of Disease Management.” (On file with author)

#### **PART IV: ADDRESSING THE CRITICISM AND TRADEOFFS**

Much of the criticism of the new innovations in pre-paid legal plans and legal management reflect simply a desire to preserve the old system and old economics—to go back to the old days.<sup>22</sup> There are, however, some valid criticisms to be leveled at a system with an active intermediary, many of them involving the tradeoff between management and professionalism.

Traditional concepts of a profession conjure up images of a doctor making a house call, an accountant settling down for a long night with the books, and a lawyer with his quill pen in his library full of statutes. Common to each of those images is an individual determined to spend as much effort as necessary to come up with the absolutely correct answer. Cost/benefit analysis was not a part of their work; they were guided only by thoroughness and perfection. That world, however, has changed. Technological advances and improved knowledge management, combined with more demanding clients, have led to what some might call a “deterioration” of the professions: quality is not judged solely on perfection but on perfection per dollar. We have moved from a world striving for no errors to a world striving for the right, cost-effective number of errors.

Whether that change is good or bad is a judgment call that does not need to be made here; the fact is that the world has changed. The question is how the professions should respond. The medical and accounting professions have already moved to a managed model, and it’s time for law to do the same. There will always be Cravath, Simpson Thacher, and other New York firms to cater to those with limitless budgets and a willingness to pay for perfection. However, both middle and lower class America need

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<sup>22</sup> See, e.g., Maute, *supra* note 7, at 917-923.

representation as well, and quality representation may be possible in a managed model. “Quality” may not be defined as perfection—but if we measured justice with a perfect scale, we might be in trouble there as well.

There are a multitude of arguments supporting the notion that quality will suffer as a result of managed legal plans: that inexperienced lawyers will handle the cases; that plan attorneys will have an incentive to spend less than adequate time and attention on important issues; that ethical issues will abound—from confidentiality to independent professional judgment; that plan holders will over-utilize lawyer and court time; that laymen will run the practice and not lawyers; that the best students will stop becoming lawyers; and the list goes on and on.<sup>23</sup> The people who make these arguments seem to ignore the fact that a managed model’s *success will be entirely dependent upon one dominant variable: customer satisfaction*. If customers aren’t satisfied, managed plans will die a quick death. To each of the nay-sayers, therefore, the market has an undisputable answer: the number of Americans paying for these plans is already significant and growing rapidly. What better indication of “quality” can there be? It may not be the old definition of “quality,” but it is, after all, the twenty-first century. Rather than fighting the momentum, perhaps it would be more productive to creatively contribute to the emerging design of a managed system to avoid the pitfalls critics keep claiming exist.

## CONCLUSION:

Most lawyers today do not appreciate that managed legal services plans are fundamentally changing the landscape, something that may change dramatically over the

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<sup>23</sup> For a more thorough sampling of the smorgasbord of complaints offered by the critics, *see, e.g.*, Heid and Misculovin, *supra* note 16.

next five years. It is hard to imagine that managed plans aren't here to stay: if one simply multiplies the simple 20-33% cost savings of legal delivery through plans by the number of billable hours per year, the potential value creation is staggering. Add to that the ability to provide more clients with more affordable, quality access to legal services, and the system looks poised to change the legal industry forever.<sup>24</sup> That is not to say that there won't be stones in the road, but the new paradigm looks extremely promising.

At their core, managed legal plans do the same thing that most companies learned how to do in the early 1990s: take a highly complex service offering which is incomprehensible to the consumer and package it as a full (and accessible) solution-based offering. As one author writes in support of widespread legal profiles (an alternative approach with similar although simpler goals):

One of the fundamental conditions underlying the “bargain” that is the essence of the Professionalism Paradigm is the fact that the delivery of professional services involves the application of “esoteric knowledge” of the kind which requires years of specialized education and training to acquire. The recipients of professional services lack the specialized knowledge necessary to evaluate the quality of services they receive.<sup>25</sup>

In the 1990s, the business world learned how to deal with such situations: insert an intermediary that is capable of matching problems with providers, packaging solutions, monitoring costs, and ensuring quality. Although the legal world is a few steps behind, the transformation of the industry is likely to be of equal consequence.

It is a shame that the legal profession appears to be so wrapped up in its own traditions that it has seemingly failed to recognize one of the greatest contributions to the scales of justice in decades. Much like medical care, our inability as a society to provide

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<sup>24</sup> See, e.g., David Segal, *Legal HMOs: Defense Against High Fees; Consumers Embracing Prepaid Plans*, WASHINGTON POST, March 14, 1998.

<sup>25</sup> Steven K. Berenson, *Is It Time for Lawyer Profiles?*, 70 FORDHAM L. REV. 645 (December 2001).

adequate access to quality legal services to a majority of our citizens is personally devastating to many people every day. The next step towards offering affordable access to wider populations may end up resting on a systemic change in the business management of legal services, and pre-paid legal services appears to be the beginning of that industry-wide transformation.